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Supreme Court, U.S.
FILED
No. 99 831 NOV 15 1999
IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

IN RE THE PATERNITY OF GREG HARRISON L.,

GAIL M., F/K/A GAIL L.
Petitioner,

v.

JEROME E. M.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF WISCONSIN COURT OF APPEALS, DISTRICT I

PETITION FOR WRIT OF CERTIORARI

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55 ?

QUESTIONS PRESENTED

1. Are a parent's or a child's Fourteenth Amendment Constitutional rights under the Due Process Clause and Equal Protection Clause violated when a court refuses to make a best interests determination before adjudicating paternity?

2. Are a parent's or a child's Fourteenth Amendment Constitutional rights under the Due Process Clause and Equal Protection Clause violated when a court fails to apply retroactively a newly-enacted statute requiring a best interests determination?

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No. _____

IN THE
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ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF WISCONSIN COURT OF APPEALS, DISTRICT I

PETITION FOR WRIT OF CERTIORARI

PARTIES BELOW

The parties before this Court are petitioner, Gail M. f/k/a Gail L. (hereinafter referred to as "Gail"), respondent, Jerome E.M. (hereinafter referred to as

"Jerome"), and the best interests of Greg Harrison L. (hereinafter referred to as "Greg"); the parties have been identical in all proceedings below.

OPINIONS AND ORDERS BELOW

The trial court entered a written order on June 3, 1997, denying Gail's motion for a pre-adjudication determination as to whether it would be in Greg's best interests for paternity to be adjudicated. That order appears in the appendix at the end of this document (App. 1, *infra*). Also on June 3, 1997, the trial court entered a written order determining paternity. (App. 2, *infra*). The trial court's order is not reported.

On June 8, 1999, the Wisconsin Court of Appeals, District I, issued a written decision denying Gail's appeal (App. 3, *infra*). This opinion does not appear in the official Wisconsin Reports.

On September 28, 1999, the Wisconsin Supreme Court entered a decision denying without comment, the petition for review. (App. 4, *infra*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The questions presented by this petition address an unsettled, novel and important area of constitutional law which has not been, but should be addressed by this Court.

While the right to a best interests determination prior to a paternity adjudication was statutorily granted in Wisconsin while this case was pending in the circuit court, the right was not applied in this case and Gail, an unmarried woman, and her son, Greg, were deprived of the protections afforded a married woman and her child in the same circumstances.

Although the legislature in the state of Wisconsin has spoken in sec. 767.463, Wis. Stats., regarding the right to a best interests hearing prior to a paternity adjudication, there are other situations throughout the country where families in which the parent or parents who are unmarried are treated differently from families in which the parents are married, and clarification of the constitutional rights of the parents and children in such situations is essential. This is an appropriate case for Supreme Court review under 28 U.S.C. §1257(a) and Supreme Court Rule 10(c).

STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

> process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 767.458(1m), Wis. Stats., must be considered to appropriately address the Constitutional rights denied in this action. That statute provides:

> In an action to establish the paternity of a child who was born to a woman while she was married, where a man other than the woman's husband alleges that he, not the husband, is the child's father, a party may allege that a judicial determination that a man other than the husband is the father is not in the best interest of the child. If the court or court commissioner under s. 757.69(3)(g) determines that a judicial determination of whether a man other than the husband is the father is not in the best interest of the child, no genetic tests may be ordered and the action shall be dismissed.

Additionally, sec. 767.463, Wis. Stats., is relevant to the determination of this case. That statute provides, in relevant part:

> . . . at any time in an action to establish the paternity of a child, upon the motion of a party or guardian ad litem, the court or court commissioner under s. 757.69(3)(g) may . . . dismiss the action if the court or court commissioner determines that a judicial determination of whether the man is the father of the child is not in the best interests of the child.

STATEMENT OF THE CASE

Gail appeals the decision of the State of Wisconsin, Court of Appeals, District I, affirming the circuit court's denial of her motion for a best interests hearing prior to holding a paternity adjudication trial and appeals the Wisconsin Supreme Court's denial of the petition for review of the appellate court decision.

This case began on April 22, 1994, nearly three years after Greg's birth, when Jerome filed a petition seeking a determination of paternity. R.1. Gail moved to dismiss the proceedings; the trial court denied her motions and ordered blood tests. R. 4, 5 & 8. Gail requested a pre-trial determination of whether an adjudication of paternity would be in Greg's best interests. R. 67:5. The court denied this request and ordered that the case proceed to trial. R. 55; R. 67:9. The court of appeals refused to allow an interlocutory appeal of the best interests issue. R. 68:104-05. The trial was conducted over nine days between June 3, 1997 and June 24, 1997. R. 64-77. The trial court found that Jerome is Greg's biological father, and, at the conclusion of the trial, adopted the recommendation of the guardian ad litem, awarding sole legal custody and primary physical placement to Gail with periods of placement with Jerome, subject to Jerome's compliance with conditions including completion of an alcohol assessment, participation in treatment, if recommended, and completion of an anger management program. R. 68:104; R. 77:24.

The court's adoption of the recommendation of the guardian ad litem was contrary to the opinion of the court's expert, Dr. Mark Ackerman, who concluded that an adjudication of paternity would not be in Greg's best interests. R. 77:2-16. The court applied the standard set forth in sec. 767.24(4)(b), Wis. Stats., which states that a child is entitled to periods of physical placement with both parents, unless physical placement with a parent would endanger the child's physical, mental or emotional health; the court did not apply the best interests standard. *Id.* Upon Gail's request, the court granted a stay of the order pending appeal. R. 81.

The findings of fact and conclusions of law were signed on October 8, 1997 and entered on October 17, 1997. R. 60. Gail filed a notice of appeal on October 17, 1997. R. 62. On November 11, 1997, the court stayed its order for physical placement with Jerome pending appeal. R. 81.

I. THE DECISION OF THE WISCONSIN COURT OF APPEALS- DISTRICT I

The court of appeals initially dismissed the appeal, because the judgment was not final in that it held open issues related to custody, placement and support. R. 79, 80. Following the parties' stipulation regarding these issues, the trial court issued a final order on August 18, 1998. R. 84. Gail appealed the order, specifically addressing the denial of equal protection and due process under the United States and Wisconsin Constitutions. The

court of appeals issued a decision on June 8, 1999, affirming the trial court's order and rejecting the Fourteenth Amendment issues (App. 3, *infra*).

This erroneous determination permitted the lower court ruling to stand and perpetuated the denial of Gail's and Greg's Constitutional rights to due process and equal protection.

II. THE DECISION OF THE WISCONSIN SUPREME COURT

On July 8, 1999, Gail filed a petition for review with the Wisconsin Supreme Court, appealing the court of appeals decision. In the petition, she again raised the constitutional issues. The petition for review was denied on September 28, 1999 (App. 4, *infra*).

REASONS FOR GRANTING THE PETITION

The petition for writ of certiorari should be granted because the Wisconsin Court of Appeals' decision violates Gail's and Greg's Fourteenth Amendment Constitutional rights denying them due process and equal protection of the law.

A. Statutory and Case Law Providing Rights to Married Parents above Unmarried Parents Violates the Fourteenth Amendment.

Pursuant to the determination in *Thomas M.P. v. Kimberly J.L.*, 207 Wis. 2d 388, 558 N.W.2d 897 (Wis. Ct. App. 1996), a biological mother who is married when the child is born and her child are afforded the procedural due process of sec. 767.458(1m), Wis. Stats., if a man other than the mother's husband claims to be the father of the child. However, under the *Thomas M.P.* rationale, an unmarried woman and her child are not afforded the protection of the procedures afforded the married woman and her child.

The Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution guarantee equal protection of the law. The United States Supreme Court has explained that equal protection "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). This Court has explained that in attacking a statute on the grounds of equal protection, "a party must show that the statute unconstitutionally treats members of similarly situated classes differently." *Tomczak v. Bailey*, 218 Wis. 2d 245, 261, 578 N.W.2d 166, 173 (1998); *see State v. Post*, 197 Wis. 2d 279, 318, 541 N.W.2d 115, 128-29 (1995). When a statute does not discriminate based upon a suspect classification, the classification will be upheld if it bears a rational relationship to a legitimate government interest. *See Thomas M.P.*, 207 Wis. 2d at 397, 558

N.W.2d at 901; *State v. McManus*, 152 Wis. 2d 113, 129, 447 N.W.2d 654, 660 (1989).

B. No Reasonable Basis Exists to Provide Married Parents Additional Rights.

Analyzing an equal protection claim is a two-step process. *See Laskaris v. Wisconsin Dells*, 131 Wis. 2d 525, 534-35, 389 N.W.2d 67, 71 (Wis. Ct. App. 1986). First, the classes created by the challenged legislation must be identified. *See id.* Second, a reasonable and practical basis must exist for the classification. *See id.*

At the time this case initially arose, the statutory and case law in Wisconsin identified two separate classes – married parents and unmarried parents. The bases for the separate classifications, as set forth in *Thomas M.P.*, 207 Wis. 2d 388, were to prevent interference with the marital father-child relationship and to preserve family unity. *Id.* at 397-398. These bases are neither reasonable nor practical. They are discriminatory. Only the "marital father-child relationship" is protected. No protection is afforded the child or parent outside a marital relationship.

In other aspects of the law, unmarried parents have all the same responsibilities and obligations as married parents. They are subject to the same standards for the care of their children and must provide the same food, shelter, and medical attention as required by law for children of married parents; no distinction is drawn. *See*, sec. 48.13(10), Wis. Stats. To grant additional rights

under the law to a woman, and additional protection to a child, simply because a woman happens to be married when she gives birth to the child, even when that child was conceived from an adulterous relationship, is unequal treatment and violates the Constitutional protections.

C. The Wisconsin Court of Appeals' Decision Provides More Constitutional Protection for an Unfaithful Spouse than for an Unmarried Woman.

The Wisconsin Court of Appeals, District I, relied on *Thomas M.P.*, 207 Wis. 2d 388, 558 N.W.2d 897, to support its decision. In *Thomas M.P.*, the court created a random demarcation between married and unmarried parents and differentiated arbitrarily between the children of these parents by distinguishing between a woman who has had a child with someone other than her husband and an unmarried women who has had a child.

Although limiting a best interests finding to the circumstances covered by section 767.458(1m), Wis. Stats., has been described as promoting "the traditional respect for the sanctity of marriage," it fails to do so, because it affords greater procedural due process to unfaithful spouses. *Thomas M.P.*, 207 Wis. 2d at 398, 558 N.W.2d at 901; *see also Michael H. v. Gerald D.*, 491 U.S. 110, 123, 109 S. Ct. 2333, 2342 (1989). Recognizing that traditional respect for the sanctity of marriage is a legitimate state objective, the statute's provisions for a best interests determination prior to a paternity adjudication for women who break their marriage vows is not rationally

related to the statute's stated purpose. Respect for the sanctity of marriage should not afford greater procedural safeguards for adulterous women and their children than for unmarried mothers and their children. To do so rewards adulterous behavior and shows disrespect for the sanctity of marriage.

Furthermore, making the distinction between the children of married and unmarried mothers is not rationally related to the stated purpose of protecting the unitary family. The present case is an example. Greg has known Gail's husband, Roger, as his father since Greg was an infant. R. 74:52-53. By the time Jerome filed the paternity petition when Greg was almost three years old, Greg was already well-bonded to Roger. R. 67:44. Greg's family is no less a unitary family than a family in which the mother was married prior to the child's birth. Introducing Jerome into Greg's family would be as disruptive to Greg's family as the introduction of a biological father into a family which the court of appeals protected in *Thomas M.P.* The purpose of a best interests hearing is to allow a judicial determination of the effect of a paternity adjudication on the child, thus protecting the child. Children, including Greg, raised in all families are entitled to this protection.

D. States throughout the country have authorized unequal treatment of unmarried mothers and their children.

Not only has Wisconsin imposed unequal standards on married and unmarried mothers, but other states have applied similar measures to the citizens of their states.

In Illinois, for example, a husband is presumed to be the father of a child if "he and the child's natural mother are or have been married to each other, even though the marriage is or could be declared invalid, and the child is born or conceived during such marriage." 750 Ill. Comp. Stat. 45/5(a)(1) (1999). This presumption is based on the historic assumption that preservation of the family unit is in the best interests of the child. Yet, in paternity cases adjudicated in Illinois, best interests is not a consideration. See, "Paternity in Illinois: Why Not Consider What is in the Best Interests of the Child?" 21 S.Ill. U.L.J. 613 (1997).

In this case, Gail recognizes that the legislature in Wisconsin has already done its part to remedy the constitutional inequities that existed by enacting sec. 767.463, Wis. Stats. Thus, Gail's constitutional challenge in this case addresses only the constitutional impropriety of the trial court and court of appeals by failing to apply sec. 767.463, Wis. Stats., to her case.

E. A Parent's Constitutional Rights Do Not Supersede the Independent Constitutional Rights of the Child.

The constitutional protection of parental rights rests upon the historic respect accorded to the relationships that develop within the unitary family. *Michael H. v. Gerald D.*, 491 U.S. 110, at 123 (1989). The unitary family includes the household of unmarried parents and their children. *Id.* at n.3. The unitary family in which Greg has been raised and has formed strong bonds, consists of Greg, Gail, and Gail's husband, Roger. Jerome has played no role in Greg's life.

The constitutionally protected rights of these parties must be balanced to the extent they conflict. However, the Wisconsin Court of Appeals' decision places the rights of Jerome above Gail's and Greg's rights and precludes a decision based upon Greg's best interests.

Greg has a liberty interest in maintaining his relationship with persons he knows as his parents. That interest was ignored in this case. Treating a child differently because of his or her illegitimacy is a violation of equal protection. This Court has consistently struck down statutes which promote unequal treatment for illegitimate children.

In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), this Court ruled that dependent, unacknowledged, illegitimate children could not be denied the right to recover under the Louisiana worker's compensation laws after the death of their father, when

dependent legitimate children had a right of recovery. The Court stated:

> Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where - as in this case - the classification is justified by no legitimate state interest, compelling or otherwise.

Weber, 406 U.S., at 175-176 (footnotes omitted).

In ruling that a Tennessee statute of limitations violated the Equal Protection Clause because it put a restriction on the support rights of illegitimate children that did not exist for legitimate children, this Court said, "[o]ur consideration of these cases has been animated by a special concern for discrimination against illegitimate children." *Pickett v. Brown*, 462 U.S. 1, at 7(1983).

When a Florida court changed custody of a child from the mother to the father because the mother had married an African-American man, the Supreme Court reversed the decision. *Palmore v. Sidoti*, 466 U.S. 429 (1984). Addressing the private biases and impermissible considerations applied by the Florida court, this Court stated,

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Palmore, 466 U.S., at 433 (1984).

This Court is, once again, presented with a state court opinion applying bias and ignoring a child's Constitutional rights to equal protection and due process. Greg's rights require that he be treated no differently from children who are raised in traditional families.

CONCLUSION

Petitioner respectfully requests that the United States Supreme Court grant this petition for writ of certiorari in order to protect Greg's and Gail's Constitutional rights to equal protection and due process of law. They are entitled to these protections by the Fourteenth Amendment to the Constitution of the United States. It is essential that this Court act again to protect the rights of all children, not just those born into a marital relationship.

Respectfully Submitted,

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November 10, 1999.

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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

In re the paternity of:

GREG H. L.,

JEROME E. M.

Petitioner, Case NO. 94 PA 122815
Case Code: 40501

vs.

GAIL L.

Respondent.

ORDER DENYING REQUEST
FOR PRE-ADJUDICATION DETERMINATION
OF BEST INTERESTS OF CHILD
AND REQUEST FOR STAY PENDING APPEAL

The court having considered the motion of respondent Gail L. now Gail M. that this court should make a best interest of the child determination prior to adjudicating paternity, that motion is denied. M.'s motion for a stay pending appeal of that issue also is denied and the trial shall proceed as scheduled.

Dated this 3 day of June, 1999.

BY THE COURT:

MICHAEL P. SULLIVAN
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

In re the paternity of:

GREG H. L.,

JEROME E. M.

Petitioner, Case NO. 94 PA 122815
Case Code: 40501

vs.

GAIL L.

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT OF PATERNITY AND PERIODS OF PHYSICAL PLACEMENT

Presiding Judge:	Michael P. Sullivan
Place:	Milwaukee County Courthouse 901 North 9th Street Milwaukee, Wisconsin 53233
Dates of Trial:	June 3,4,5,9,10,11,12,16 and 24,1997

Appearances:

Petitioner appeared in person and by attorney Robert M. Courtney of Courtney & Molter, S.C., 1110 Old World 3rd Street #215, Milwaukee, WI 53203.

Respondent appeared in person and by attorney Richard E. Reilly of Gimbel, Reilly, Guerin & Brown, 2400 Milwaukee Center, 111 East Kilbourn Avenue, Milwaukee, WI 53202.

Also appearing as guardian ad litem for Greg H. L. was attorney Kevin B. Dunn, 823 North Cass Street, Milwaukee, Wisconsin 53202.

The undersigned judge before whom this action was tried, does hereby make these findings of fact, conclusions of law and judgment.

FINDINGS OF FACT

1. All necessary parties have been duly served and ordered to appear for trial on the petitioner's summons and petition for adjudication of paternity which was originally filed on April 22, 1994.

2. The petitioner in this action is Jerome E. M. (M) of 3975 Lower Unit 124 Honoapiilani Hwy, Lahaina, Hawaii 96761, and W156N8514 Pilgrim Road, Menomonee Falls, Wisconsin 53051.

3. The respondent in this action is Gail L. n/k/a Gail M. (M) of Glendale, Wisconsin 53209.

4. M. is now married; however, the marital presumption under section 891.39 Wis. Stats., does not apply because the conception and birth of the child did not occur while M. was married.

5. M. gave birth to Greg H. L. June 28,1991 in the City and County of Milwaukee. It was a full term pregnancy and pursuant to section 891.35 Wis. Stats., the conceptive period occurred 240 to 300 days prior to June 28, 1991 (September 29,1990 through November 1, 1990).

6. The genetic blood test results determined that the probability of paternity for Greg H. L. is 99.99%.

7. The clear and satisfactory preponderance of the evidence establishes M. as the father of Greg H. L.

8. Neither party has begun any other action for adjudication of paternity and placement anywhere else.

9. The parties presented testimony regarding custody and physical placement of Greg H. L.

10. The guardian ad litem presented oral recommendations regarding custody and physical placement of Greg H. L. which are attached hereto as Exhibit 2 and adopted by the court as set forth in the court's bench decision of June 245, 1997.

11. The court set forth its findings of fact and conclusions of law in its bench decision on June 24,1997, which the court adopts, incorporates by reference and attaches as Exhibit 1.

CONCLUSIONS OF LAW AND JUDGMENT

12. The court determines the paternity of Greg H. L, born June 28, 1991 is Jerome E. M.

13. Custody and Physical Placement.

    a. Gail L. M. is awarded sole legal custody of Greg H. L.

    b. Primary physical placement of the child is awarded to Gail M. with physical placement with Jerome M. under the conditions as set forth in the court's oral decision of June 24, 1997.

14. *INTERFERENCE WITH CUSTODY AND PARENTAL RIGHTS.* Whoever intentionally violates any of the following criminal statute may be punished by a fine or not more than $10,000.00 or imprisoned not more than two years or both:

    Sec. 948.31 Wis. Stats. *Interference with custody by parents and others.*

    (1)(a) In this subsection, "legal custodian of the child" means:

A parent or other person. having legal custody of the child under an order of judgment in an action for divorce, legal separation, annulment, custody, paternity, guardianship or habeas corpus.

15. The department of health and social services or any person, county department under § 46.215, 46.22 or 46.23 or licensed child welfare agency, if custody of the child has been transferred under ch. 48 to the department, person or agency.

(b) Except as provided under ch. 48, whoever intentionally causes a child to leave, takes a child away or withholds a child for more than 12 hours beyond the court-approved visitation period from a legal custodian with intent to deprive the custodian of his or her custody rights without the consent of the custodian is guilty of a Class E felony. This paragraph is not applicable is the court has entered an order authorizing the person to so take or withhold the child.

(2) Whoever causes a child to leave, takes a child away or withholds a child for more than 12 hours from the child's parents, or the child's mother in the case of a non marital child where parents do not subsequently intermarry under §767.60, without the consent of the parents or the mother, is guilty of a Class E felony. This subsection is not applicable if custody has been granted by court order to the person taking or withholding the child.

(3) Any parent, or any person acting pursuant to directions from the parent, who does any of the following is guilty of a Class E felony:

(a) Intentionally conceals a child from the child's other parent.

(b) After being served with process in an action affecting the family but prior to the issuance of a temporary or final order determining custody rights to a child, takes the child or causes the child to leave with intent to deprive the other parent of physical custody as defined in §822.02(9).

(c) After issuance of a temporary or final order specifying joint custody rights, takes a child from or causes a child to leave the other parent in violation of the custody order or withholds a child for more than 12 hours beyond the court-approved visitation period. (4) (a) It is an affirmative defense to prosecution for violation of this section if the action:

(4)(a) It is affirmative defense to prosecution for violation of this section if the action:

1. Is taken by a parent or by a person authorized by a parent to protect his or her child from imminent physical harm or sexual assault;
2. Is taken by a parent fleeing from imminent physical harm to himself or herself;
3. Is consented to by the other parent or any other person or agency having legal custody of the child; or
4. Is otherwise authorized by law.

(b) A defendant who raises an affirmative defense has the burden or proving the defense by a preponderance of the evidence.

(5) The venue in an action under this section is prescribed in §971.19(8).

(6) In addition [to any] other penalties provided for violation of this action, a court may order a violator to pay restitution, regardless of whether the violator is placed on probation under § 973.09, to provided reimbursement for any reasonable expenses incurred by any person or any governmental entity in locating a returning the child- Any such amounts paid by the violator shall be paid to the person or governmental entity which incurred the expense on a prorated basis. Upon the application of any interested party, the court shall hold an evidentiary hearing to determine the amount of reasonable expenses.

15. *CHILD SUPPORT*

Determination of current and past due child support in this action is held in abeyance pending further hearing and order of the court.

16. The clerk of courts, pursuant to § 806.06(l) and (2) shall enter this judgment forthwith by affixing a file stamp that is dated.

Dated at Milwaukee, Wisconsin, this 8 day of October, 1997.

BY THE COURT:

_____

MICHAEL P. SULLIVAN
Circuit Court Judge

Judgment entered this ____ day of October 17, 1997, 19_____.

_____

Judgment Clerk

COURT OF APPEALS

DECISION DATED AND FILED

NOTICE

June 8, 1999

Marilyn L. Graves

Clerk, Court of Appeals

Of Wisconsin

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and Rule 809.62, Stats.

No. 98-2786
STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

In re the Paternity of Greg Harrison L.:
Jerome E.M.,

Petitioner-Respondent,

V.

Gail M., f/k/a Gail L.,
Respondent-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PERCURIAM. Gail M. appeals from the "Findings of Fact, Conclusions of Law, and Judgment of Paternity and Periods of Physical Placement," following a bench trial. Sheargues that the trial court erred in concluding that she was not entitled to a hearing to determine whether, before ordering blood tests and adjudicating Jerome E. M.'s paternity petition, it would be in her son's best interests to determine whether Jerome was his father. She also argues that the trial court erroneously exercised discretion in awarding Jerome periods of placement with her son.

We conclude that, under *Thomas M.P. v. Kimberly J.L.* 207Wis. 2d 388, 558 N.W.2d 897 (Ct. App. 1996), the trial court correctly ruled that Gail had no right to a "best interests" hearing, and that Jerome had a right to the adjudication of his paternity petition. We also conclude that the trial court properly exercised discretion in ordering periods of physical placement with Jerome, subject to his satisfaction of certain conditions. Accordingly, we affirm.

The facts relevant to resolution of this appeal are not in dispute. On June 28, 1991, Gail gave birth to Greg. On April 22, 1994, despite never having had any contact with Greg,[1] Jerome petitioned for the determination of his alleged paternity. Gail moved to dismiss the petition on the grounds that an adjudication of paternity would not be in Greg's best interests. Concluding that *Thomas M.P.*

controlled, the trial court denied her motion, ordered blood tests, determined that Jerome was Greg's father, and refused to consider Greg's best interests until addressing issues of custody and placement.

In *Thomas M.P.*, this court considered the constitutionality of §767.458(lm), Stats., the statute Gail challenges. In relevant part, the statute states:

> In an action to establish the paternity of a child who was born to a woman while she was married, where a man other than the woman's husband alleges that he, not the husband, is the child's father, a party may allege that a judicial determination that a man other than the husband is the father is not in the best interest of the child. If the court ... determines that a judicial determination of whether a man other than the husband is the father is not in the best interest of the child, no genetic tests may be ordered and the action shall be dismissed.[2]

Our standards of review of Gail's challenge to the statute in the instant appeal are identical to those recited in *Thomas M.P.* and need not be repeated here.

> As in the instant case, the mother in *Thomas M.P.* moved to dismiss the paternity petition of a man who alleged that he was the father of her child. *Thomas M.P.*, 207 Wis. 2d at 391, 558 N.W.2d at 899. As in the instant case, the mother argued that the determination of paternity would not be in her child's best interests, *Id.*, As in the instant case, the mother in *Thomas M.P.* brought an equal protection challenge, though she argued that § 767.458(lm),

> Stats., violated her child's right to equal protection by unreasonably distinguishing between children born inside and outside of wedlock, *id.* at 395-96, 558 N.W.2d at 900, whereas Gail argues that the statute violates her right to equal protection by doing so.
>
> In *Thomas M.P.* , this court rejected the mother's arguments and reversed the trial court's order for a "best interests" hearing to decide whether paternity should be determined. We concluded:

(1) The statutes governing who may bring a paternity petition and how courts must respond to such actions "expressly provide[] the alleged father of a child the right to a determination of paternity, regardless of the circumstances of the case or the circumstances out of which paternity may have arisen." *Id.* at 394, 558 N.W.2d at 900; see § 767.45(l) and (5)(a), Stats., and § 767.48(l)(a), Stats. Thus, we explained:

> Because the legislature has not provided a best interests hearing, the court exceeded the legislatively mandated procedure when it ordered a best interests hearing as a prerequisite to blood tests. The trial court therefore lacked the statutory authority to conduct the best interests hearing and to dismiss the paternity proceedings.

Id.

(2) Section 767.45 8(1 m), Stats., does not violate the equal protection rights of a child born outside of wedlock. We explained:

> At first blush, one could easily come to the conclusion that children born outside of wedlock should not be treated differently because it is the child's best interests that are at issue. The legislature could have said that, but it did not. The question then becomes whether there is a legitimate rational basis for this distinction. The reasonable basis for the legislation is to protect children born into a marriage from the interference of another man with the existing marital father-child relationship, and to preserve family unity.
>
> The statute promotes the traditional respect for the sanctity of marriage and the preservation of the unitary family.... "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."
>
> We are satisfied that the historic respect for the unitary family and the legislature's intent to preclude interference with an otherwise secure environment for the child are sufficient reasonable grounds for the legislature's classifications, and the legislative classification is germane to the

> purpose of the law. We therefore determine that § 767.458(lm), Stats., withstands the equal protection challenge.

Thomas M.P. 207 Wis. 2d at 397-98, 558 N.W.2d at 901 (citations omitted).

> In the instant appeal, Gail raises an issue identical to that addressed in Thomas *M.P.* whether a "best interests" determination regarding adjudication of paternity should be a prerequisite to such adjudication. She also raises an issue that is almost identical to that addressed in *Thomas M.P.* whether § 767.458(lm), Stats., denies equal protection to women who have children outside of wedlock , notwithstanding the fact that *Thomas M.P.* held that the statute does not deny equal protection to children by distinguishing between those born inside and outside of wedlock. On both issues, we reject her arguments.
>
> Regarding whether a "best interests" determination should be required, Gail contends that this court's decision in *Thomas M.P.* "was wrong" and, therefore, she "respectfully urges this court to disregard the erroneous conclusion of the Third District [Wisconsin Court of Appeals decision in *Thomas M.P.*] and to remand this case to anew circuit court judge for consideration of whether an adjudication of paternity would be in Greg's best interest."

This, of course, we cannot do; *Thomas M.P.* controls.[3] *See Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246, 256 (1997) ("[T]he court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals.").

Regarding whether § 767.45 8(1m), Stats., denies equal protection to women who have children outside of wedlock, Gail contends that because her equal protection theory focuses on her rights, rather than those of her child *Thomas M.P.* does not control. But as Greg's guardian ad litem has pointed out in his brief to this court: "[Gail] offers no argument how or why the outcome should be different. The rational basis for the classification as found in [*Thomas M.P.*] exists whether challenged by child or mother." We agree. Although Gail has offered earnest arguments that could be directed to the legislature to persuade it to reconsider or refine the distinction it has drawn, she has provided no authority to suggest that *Thomas M.P.* 's rationale, rejecting the equal protection challenge on behalf of a child, should be any less applicable to an equal protection challenge on behalf of the mother.[4]

Gail also argues that "[e]ven if this court agrees with the trial court that a pre-adjudication determination of the best

interests of the child should not be not [sic] required, this court still should reverse that portion of the judgment awarding Jerome periods of physical placement with Greg." Again, we disagree.

Following the trial, the court awarded sole custody and primary placement to Gail, but also adopted the guardian ad litem's recommendation to award placement to Jerome subject to his satisfaction of several conditions including completion of an alcohol assessment and treatment, if needed, as well as completion of an anger management program. Gail now urges reversal of the trial court's decision based on five factors: (1) the opinion of Dr. Marc Ackerman, the trial court's appointed expert, that placement with Jerome would not be in Greg's best interests; (2) the undisputed evidence of Jerome's violence and threats against his ex-wife, children, Gail, and others; (3) the fact that Greg has never seen Jerome and considers Gail's husband as his father; (4) what she considers the improper weight the trial court placed on Jerome's positive relationship with his granddaughter; and (5) what she also considers the trial court's inappropriate emphasis on § 767.24(4)(b), Stats., and its specification that "[a] child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent

would endanger the child's physical, mental or emotional health."[5]

As Gail acknowledges, a trial court has broad discretion in determining physical placement, and this court will not reverse a trial court's decision granting placement absent an erroneous exercise of discretion or misapplication of law. *Wiederholt v. Fischer*, 169 Wis. 2d 524, 530, 485 N.W.2d 442, 444 (Ct. App. 1992). As she also concedes, additional evidence, as well as the guardian ad litem's recommendation, provided the trial court with arguable bases for its resolution of what the guardian ad litem termed a "very difficult and very close" case. See *Paige K.B. v. Molepske,* 219 Wis. 2d 418, 428-29, 580 N.W.2d 289, 294 (1998) ("[B]oth the GAL and the circuit court are statutorily charged with determining and protecting the best interests of [a] child" in proceedings involving child custody.).

A trial court determining the appropriateness of a child's placement with a non-custodial parent must consider and apply the factors specified in § 767.24(4), Stats. *Jocius v. Jocius,* 218 Wis. 2d 103,112, 580 N.W.2d 708, 712 (Ct. App. 1998). Although Gail believes that the trial court's decision "gave short shrift to many of the statutory factors," she offers nothing to establish that the trial court failed to

consider or apply them properly. Indeed, the record reflects the trial court's careful consideration of the evidence and the relevant statutory factors. As the guardian ad litem points out, the trial court considered substantial evidence beyond that to which Gail refers, including the testimony of Dr. Steven Emiley that it was in Greg's best interests to have contact with Jerome.[6] We see no erroneous exercise of discretion.

By the Court. -Judgment affirmed.

This opinion will not be published. *See* Rule 809.23(l)(b)5, Stats.

1. According to Greg's guardian ad litem, however, "at the time of [Greg's] birth, [Jerome] showed an initial interest in that child by filing the declaration of paternity" and, "Prior to commencement of this paternity case, he sent cards to the child, ... he sent gifts, ... he attempted to initiate a parental role or relationship with the child." Evidence also revealed that Jerome had established a custodial account for Greg and placed money in that account. The trial court found that Jerome had, indeed, shown a continuing interest in Greg since shortly after his birth.

2. The quoted portion of §767.458(lm), Stats., differs slightly from the statute considered by this court in *Thomas M.P. v. Kimberly*

J.L. 207Wis. 2d 388, 558 N.W.2d 897(Ct. App. 1996). Subsequent to the circuit court litigation in *Thomas M.P.*, the legislature modified the last sentence, replacing the word "blood" with the word "genetic." See 1995 Wis. Act 100, § 11. The modification, however, has no bearing on the issues in the instant appeal.

3. Additionally, we note, even if the trial court had concluded that a "best interests" determination was a prerequisite to the paternity determination, the paternity adjudication still would have taken place. As the guardian ad litem explains:

> [W]hen the trial court in this case ultimately applied the best interests standard it concluded, over the objection of the appellant, that Jerome should have periods of placement with Greg. Had the best interest standard been applied by the trial court prior to adjudication as urged by the appellant, the outcome would have been the same.

4. Gail attempts to bring her equal protection challenge not only to § 767.458(lm), Stats., but also to several other statutes and administrative rules which, she contends, establish an improper statutory scheme that violates the rights of many other mothers who, under a variety of circumstances, give

birth out of wedlock. As she concedes, however, "she does not fall within any of these categories." Thus, Gail fails to establish that any of these additional statutes and rules violates her rights. In short, she fails to provide any substantive reply to the argument, from both Jerome and Greg's guardian ad litem, that she lacks standing to bring these additional challenges.

5. The trial court found that there was insufficient evidence that "periods of physical placement [of Greg] with [Jerome] would endanger the child's physical, emotional and mental health." This was, however, but one of numerous factual findings.

6. The trial court concurred with the guardian ad litem's summation of the conclusion by Dr. Emiley and Dr. Ackerman that "there is the possibility of some emotional trauma to Greg if he is not told who his [biological] father is and learns of this through a source other than his mother at some point in the future." The court declared that Jerome "has been denied access to [Greg] with no hope for access long enough.... I think the older [Greg] gets before he knows who his father is, the tougher it's going to be for him.".

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You are hereby notified that the Court has entered the following order:

No. 98-2786

In re Paternity of Greg Harrison L.:
Jerome E.M. v. Gail M., f/k/a Gail L.
L.C.#94PA122815

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of

respondent-appellant-petitioner, Gail M., f/k/a Gail L., and considered by the court,

IT IS ORDERED that the petition for review is denied, with $50 costs.

Marilyn L. Graves
Clerk of Supreme Court